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No. 96-1824

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARY LEE, M.D., individually and on behalf of his terminally ill patients; WILLIAM PETTY, M.D., individually and on behalf of his terminally ill patients; JANICE ELSNER, individually and as representative of a class of terminally ill patients; et al.,

Petitioners,

v.

F. DOUGLASS HARCLEROAD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT STATE OF OREGON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the facts in this record establish that plaintiffs personally will suffer an imminent, concrete, and non-speculative injury sufficient to give them standing to challenge Oregon's Death With Dignity law.

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STATEMENT OF THE CASE

The questions presented in the petition for certiorari raise three issues, all of which involve whether specific plaintiffs have standing. Neither the allegations of the complaint nor the specific facts relevant to standing are set forth in the petition's statement of the case, however. Although the statement of the case provides some facts relevant to one named plaintiff (Janice Elsner), it does so only in conclusory and argumentative terms. Pet. Cert. 2. The State therefore offers the following description of the complaint and the specific facts produced by affidavit or deposition that are important to the standing issues presented. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (as trial proceeds beyond pleading stages, a plaintiff can no longer rest on generalized allegations of injury, but must produce "specific facts" to support standing).

I. Plaintiffs' Legal Theories

Plaintiffs filed a class action complaint alleging that Oregon's Death With Dignity Act ("Measure 16" or "the Act") violates various constitutional provisions, primarily the Equal Protection and Due Process Clauses of the federal constitution, as well as certain rights secured by federal statute.[1] The complaint set forth allegations for three categories of plaintiffs: persons suffering from debilitating or terminal illnesses; physicians; and nursing or other care facilities. The thrust of the complaint was that Measure 16 is unconstitutional because it lacks adequate safeguards to ensure that a terminally ill person's decision to obtain a lethal prescription will be competently and voluntarily made. *See generally* Third Amended Complaint for Declaratory and

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[1] Specifically, the plaintiffs alleged violations of equal protection and due process under the Fourteenth Amendment; free exercise, speech and association under the First Amendment; the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 1201 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.*; and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*

Injunctive Relief. The medical and care professionals also alleged that the measure would force them to act contrary to their religious or associational interests. Complaint, ¶¶ 4–5, 10–13.

In particular, the complaint alleged that inadequate safeguards exist to protect patients from undue influence, coercion, depression, mental and/or emotional disability in making the decision whether to seek physician assistance in dying. Complaint, ¶¶ 45–51. The allegations culminated in the assertion that Oregon has "an obligation * * * to provide safeguards assuring voluntariness commensurate with the risk involved to its citizens." Complaint, ¶ 52. The complaint then set forth in five counts the particular constitutional and statutory violations that plaintiffs claimed Oregon's Death With Dignity Act violated. Complaint, pp. 32–39.

II. Janice Elsner

Only one of the individual patient plaintiffs, Janice Elsner, remains in the case.[2] As to her, the full text of the allegations in the complaint were as follows:

> Plaintiff Janice Elsner is a person with progressive muscular dystrophy who uses a wheelchair. She is a resident of Portland, Oregon. She is 46 years old and has had periods where she is so weak that she is limited to a liquid diet because she is too tired to eat. At such times, she can't turn over in bed. She does not know how long she has to live, but has already lived longer than expected. She has problems with depression as a result of her condition and understands that depression may go undiagnosed and causes some to consider suicide. She

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[2] The district court found standing for only two of four patient plaintiffs, Eric Dotson and Janice Elsner. Pet. Cert. App. 59a–61a. Eric Dotson later died of AIDS. Petitioners did not cross-appeal the denial of standing to the other two patient plaintiffs. Therefore, Janice Elsner is the only remaining patient plaintiff and potential class representative.

> would never want to consider assisted suicide but understands that persons who have the disability of a terminal disease are sometimes subject to undiagnosed depression or undue influence while in a debilitated state and become persuaded to act contrary to their true intent, which she would never want to happen to her. She believes the inadequate safeguards of Ballot Measure 16 increase the vulnerability of persons like herself to request assisted suicide despite their true intent. She brings this suit on her own behalf and as a co-representative of a class of persons who have the disability of a terminal disease even with medical treatment.

Complaint, ¶ 7.

In response to the defendants' motions for summary judgment, plaintiffs submitted Janice Elsner's affidavit. Pl. Supp. Stmt. of Material Facts. The affidavit established that Ms Elsner, who is a mother and a homemaker, has suffered from muscular dystrophy since the age of eight. (Elsner Aff., at 1). For a couple of months during the last three years, the physical exhaustion caused by her condition became particularly extreme and, contrary to her usual "very cheerful and optimistic" nature, she became depressed. (*Id.*, at 2).

Ms Elsner averred that she "understands" that depression may go undiagnosed and "causes some to consider suicide." Similarly, she "understands" that terminally ill persons are "sometimes subject to undiagnosed depression or undue influence" and "become persuaded to act contrary to their true intent." (*Ibid*). As to her own possible suicidal tendencies, however, nothing in her affidavit states or implies that she has ever considered actively taking her own life. Instead, she said only: "Though I would never choose assisted suicide willingly, I cannot foresee how I will feel under circumstances which I have not yet experienced." (*Ibid*).

Defendants deposed Ms Elsner and submitted relevant portions of that affidavit to the district court in support of their motion for summary judgment. *See* Def. Supp. Stmt. of Material Facts. Ms Elsner confirmed that she does not know how long she will live, but she acknowledged that no doctor has advised her that she has only a short time to live or has given her any other estimate of time. (Elsner Depo., at 13–14, 20). Her medical condition is such that she could live another five to ten years, or only a short time longer. (*Id.*, at 20). Her doctors "stay pretty hopeful" about her condition, however. (*Ibid*).

On the subject of depression, Ms Elsner elaborated on her statement in her affidavit that she has problems with depression. She explained that she has been diagnosed as depressed only once. (*Id.*, at 20). That occurred a couple of years ago when, in the course of an unrelated and prescheduled appointment, Ms Elsner's emotional condition caused her doctor to be concerned about possible depression and to refer her to a mental health professional. (*Id.*, at 39–40). She was diagnosed as depressed and treated by a psychologist. The treatment did not require medication. (*Ibid*). The referral to the psychologist was made by Ms Elsner's regular doctor and was the doctor's idea, not hers. (*Id.*, at 40). Although she has not been diagnosed as depressed before or since then, (*Id.*, at 20), she believes she in fact has been depressed at other times when her health has been particularly bad. (*Id.*, at 14). At the time of the lawsuit, she was not depressed. (*Id.*, at 20).

Ms Elsner did not describe herself as ever having contemplated killing herself under any circumstance. At most, she once expressed some ambivalence about whether she wanted to continue living. When her doctor became concerned about her emotional condition and referred her to a psychologist, he asked her whether she wanted to live. She told him "I don't know. I

don't think so," or something to that effect. (*Id.*, at 39). She did not suggest that she has ever considered actively taking her own life, however. Nor has she ever asked a physician for help in taking her life. (*Ibid*). To the contrary, Ms Elsner stated that she would not request a lethal prescription as authorized by Measure 16. (*Id.*, at 32). When asked if she thinks that "in the future something could happen" that would change her mind, she answered "You never know. Probably not, no." (*Ibid*). When asked a second time if she could foresee any scenario in which she might end up choosing or requesting assisted suicide, her answer was:

> It's easy to say no. I mean, I would never consider it or anything, but when I was really sick, and if I remember that time correctly, it was a hell of a time, and you lay there and it's really hard to think and you get really depressed. And because you need so much care, you feel like you're imposing on too many people for too many days and it—and I think sometimes in your deep depression you could probably just say "I want to give it up." *But I don't foresee myself doing that.*

(*Id.*, at 37) (emphasis added).

Nor did Ms Elsner believe that undue influence or coercion might cause her to invoke the choices available under Measure 16. Her family knows of her opposition to physician-assisted suicide and supports her in her efforts to oppose it. (*Id.*, at 11). She has talked to her doctor about her involvement in the litigation opposing Measure 16. (*Id.*, at 32). She is not aware of anyone—family, friends, health care providers, or others—whom she believes might try to coerce her to obtain physician assistance under Measure 16 to end her own life. (*Id.*, at 29). If she were without medical insurance, she might be concerned that financial hardship might be a factor. But her medical expenses are paid through Medicaid, a tax-supported program, and she has

no reason to worry that her health care benefits will be cut off. (*Id.*, at 10–11, 38).

Ms Elsner stated explicitly that she could not identify any injury she has suffered due to Measure 16. (*Id.*, at 34). She is involved in the litigation for the same reasons that she opposed Measure 16 during the campaign in Oregon. Her efforts as a plaintiff are a continuation of her earlier effort to defeat the measure. (*Id.*, at 25–26). She would oppose any form of law that would provide physician assistance in dying for the terminally ill, even one containing stronger safeguards. (*Id.*, at 15).

III. Physicians and Care Facilities

Dr. Gary Lee alleged that Measure 16 contains inadequate safeguards to protect patients from seeking physician assistance in dying due to depression or undue influence. He claimed standing to assert:

> the rights of his patients who have the disability of a terminal disease who do not wish to engage in assisted suicide but may be subject to internal and external pressures toward assisted suicide which they may be unable to resist given the lack of appropriate safeguards.

Complaint, ¶ 4. He also objected "on moral grounds" to being required to advise patients of their rights under Measure 16 and having to transfer patient records to other physicians who would assist patients under the Act. *Ibid.* Dr. William Petty's allegations were substantially identical, except he based his objections on religious as well as moral grounds. Complaint, ¶ 5.

Similarly, various care facilities and nursing homes objected on free speech and freedom of religion grounds to having physicians on staff who might opt to assist patients under the Act, or having to associate in other ways with individuals (*e.g.*, witnesses) who might be involved in a patient's decision to seek a lethal

prescription from a physician. Complaint, ¶¶ 11, 12, 13. In an allegation identical to that of Drs. Lee and Petty, two of the three care facilities asserted the rights of terminally ill patients who do not want a physician to assist them in dying, but who might opt for a lethal prescription because the Act contains inadequate safeguards to protect them from coercion and influence. Complaint, ¶¶ 11, 13.

REASONS TO DENY THE WRIT

I. Introduction

On November 8, 1994, Oregon voters enacted the Death With Dignity Act (Measure 16), which had been placed on the ballot through the State's initiative process. Measure 16 establishes a statutory framework within which a competent terminally ill adult legally may request a prescription for medication "for the purpose of ending his or her life in a humane and dignified manner." Measure 16, § 2.01, Pet. Cert. App. 22a. With that enactment, Oregon became the first State in history to give recognition to the often compelling concerns of competent terminally ill adults who seek to meet death in a manner that reflects their values and preserves their personal dignity.[3]

Petitioners seek to heighten the Court's interest in this case by emphasizing the historical significance of Oregon's law and

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[3] Those concerns are undeniably compelling in human terms, and perhaps in some circumstances, constitutional ones as well. The majority opinion in *Washington v. Glucksberg* explicitly stated that, in declining to announce a general due process right to physician-assisted death, it was not foreclosing the possibility that such a right might be acknowledged in individual circumstances. ___ U.S. ___, 117 S.Ct. 2258, 2275, n. 24 (1997). Several of the concurring opinions suggest more strongly that on different facts, some members of the Court might find constitutional protection for individual autonomy in avoiding excessive pain and in controlling the timing and manner of death. *E.g.*, O'Connor, J., 117 S.Ct., at 2302–03 (concurring); Stevens, J., 117 S.Ct., at 2304–05 and 2310 (concurring in the judgment).

by inviting the Court to proceed all but directly to the merits of their challenges. *See, e.g,* Pet. Cert. 7–10. The only issue before the Court, however, is standing: Standing was the only issue decided by the court of appeals and the only issue framed by the questions presented and briefed in the petition for certiorari. Sup. Ct. Rule 14(1) (issues before the Court are limited to the questions presented). As the Court has on other occasions, it "must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312, 2317 (1997) (standing to challenge Line Item Veto Act). Standing, as a jurisdictional requirement and constitutional imperative, cannot be waived, bypassed, or decided in favor of plaintiffs for the sake of expediency. *See generally ibid*; *Allen v. Wright*, 468 U.S. 737, 750–53 (1983).

The case does not warrant a grant of certiorari. The standing issue at most presents questions that turn on the application of settled law to these particular facts. Moreover, the court of appeals decided the case correctly, so review would not alter the outcome. Finally, review would serve only to unnecessarily delay the case, and in doing so, to forestall implementation of Oregon's law or final resolution of whatever constitutional challenges may be brought by proper plaintiffs.

II. The Standing Issue in this Case Does Not Warrant Certiorari Review.

A. This Case Involves Only a Fact-Specific Application of Settled Legal Principles.

One of the "bedrock requirements" of Article III, section 2 of the Constitution is that federal courts have jurisdiction only over "cases" or "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,

454 U.S. 464, 471 (1982). A key element of the case-or-controversy requirement is that a plaintiff, based on the complaint, must establish standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S., at 561 (plaintiffs bear burden of establishing standing).

The Court has "consistently stressed" that to satisfy the standing inquiry a plaintiff must establish that a "personal stake" in the alleged dispute in the form of an injury that is personal to the plaintiff. *Raines v. Byrd*, 117 S.Ct., at 2317 (citing cases). The "injury in fact" requirement is an exacting one: the harm must be concrete and particularized, actual or imminent, and not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S., at 560 (citing cases). Moreover, there must be a distinct causal connection between the injury and the conduct complained of—that is, the injury must be "fairly * * * traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Ibid.* Finally, it must be "likely" and not merely "speculative" that the injury will be redressed by a favorable decision. *Ibid.* Those requirements reinforce a fundamental concept that underlies the standing doctrine: the federal judiciary is not the appropriate forum to address generalized complaints that primarily reflect moral or philosophical disagreement with the law; rather, a court's role is to adjudicate specific legal rights and obligations as between parties who have a direct stake in the outcome of the adjudication. *See Allen v. Wright*, 468 U.S., at 760–61.

The Ninth Circuit, in concluding that plaintiffs lack standing, looked to the settled jurisprudence of this Court. Pet. Cert. App. 8a–16a. The court of appeals' focus was on whether plaintiffs had demonstrated that they had suffered any injury-in-fact. Specifically, the court of appeals scrutinized plaintiffs' claims to

determine whether the injuries that plaintiffs claimed they would suffer were real, concrete, and imminent or, alternatively, whether they were remote, speculative, or unlikely. *Ibid.* Although that inquiry alone defeated plaintiffs' claims, the court also expressed doubts about whether there was adequate causal connection between the injury and the conduct complained of, and whether the injury would be redressed by a favorable decision. *Id.*, at 15a–16a and nn. 3, 4.

Plaintiffs' disagreement with the decision below is essentially a quarrel with the result, not with the applicable law.[4] As plaintiffs' arguments in the petition generally suggest, and as they state explicitly at one point, they frame their standing arguments within "the mainstream of conventional standing law." Pet. Cert. 23. To be sure, plaintiffs may dispute whether the court of appeals was faithful to the controlling principles, just as the State questions whether plaintiffs' arguments are faithful to the stringent requirements of the Court's settled jurisprudence. But that, too, is a dispute directed to the correctness of the result rather than to the principles that guide the inquiry.

Thus, this is a case that turns on its facts. It presents the Court only with a question of whether established standing principles were correctly applied to this record. A grant of review would not resolve any significant conflict among lower

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[4] Plaintiffs and their amici's insistence on characterizing this as a claim of "stigmatic injury" adds nothing of significance to the analysis. *See* Pet. Cert. 23; Am. Disabled et al. Am. Br. 8–10. A claim of stigmatic injury, too, requires a demonstrated injury-in-fact in the form of some concrete interest that has been directly invaded. *Allen v. Wright*, 468 U.S., at 756, n. 22. As the Court has observed, if abstract stigmatic injury were cognizable, standing would become automatic for any member of a generalized group interested in a law or its application, not just injured members of the group. *Id.*, at 756. That in turn would transform the federal courts into "no more than a vehicle for the vindication of the value interests" of concerned citizens, a result that Article III precludes. *Ibid* (citation omitted).

courts.[5] Review would not clarify any important area of law that is confused or in disarray. Nor do plaintiffs seek to have the Court recognize some new principle of standing. In short, the petition merely invites the Court to correct a perceived error; it presents no issue of importance beyond the resolution of this particular standing dispute. That is not the kind of compelling basis on which the Court traditionally does, or in this case should, exercise its certiorari jurisdiction. *See* Sup. Ct. Rule 10.

B. The Ninth Circuit Resolved the Standing Inquiry Correctly.

Even were this Court to grant certiorari to review this fact-specific issue, that review would not change the outcome. The Ninth Circuit correctly determined that the remaining patient (Janice Elsner), physicians (Drs. Lee and Petty), and care facility plaintiffs failed to demonstrate a sufficient injury-in-fact to confer standing.

1. Janice Elsner

Plaintiffs argue that Janice Elsner has standing for two reasons. First and foremost, they claim Elsner will suffer a *future* injury because she has an established history of "recurring bouts of suicidal depression" that create an "imminent and substantial risk" that she will end her own life using the physician assistance available under Measure 16, against her true desire to continue living. Pet. Cert. 2, 16–22. Second, petitioners assert a *present* injury, the "essence" of which "lies in the unequal treatment that denies them the same benefits of the

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[5] The only "conflict" petitioners point to is one inherent in standing analysis —that is, different results arising from the application of settled analysis to different fact patterns. *See Allen v. Wright*, 468 U.S., at 751–52 (because standing concepts have gained considerable definition, the standing inquiry in many cases can be answered chiefly by comparing the allegations of a particular complaint to those made in prior standing cases).

homicide code and civil protections provided to non-terminally ill individuals." Pet. Cert. 25. This injury, they maintain, will be inflicted "the moment that Measure 16 becomes law." *Ibid.*

a. Terminal Illness

The first problem with Ms Elsner's standing is fundamental and eclipses the several other defects in her claims of future and present injury: she has neither alleged nor demonstrated through specific proofs that she is terminally ill. Thus, she has not even demonstrated that she falls within the class of citizens subject to Measure 16 procedures.[6]

Measure 16, in unequivocal terms, defines "terminal disease" to mean "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six (6) months." Section 1.01 (12), Pet. Cert. App. 22a. No physician has diagnosed Ms Elsner as having less than six months to live. There is no suggestion that any physician, within reasonable medical judgment, could do so. To the contrary, Ms Elsner was explicit in describing her condition as one in which that diagnosis *cannot* be made—she might live only a short time, but she is just as likely to live five or ten years more. Her doctors remain "pretty

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[6] That is not to say that someone who is not terminally ill might not have standing to bring some form of challenge to Measure 16. Indeed, perhaps the more foreseeable challenge to this law would be by individuals who are not terminally ill within the statute's definition, but who have compelling personal reasons (*e.g*, permanent incapacity and severe pain) to end their own lives with physician aid. Such an individual likely would have standing to assert an equal protection claim on the theory that the law irrationally limits the "benefited class" to persons diagnosed as having less than six months to live. Whether that challenge would prevail, of course, is an open question. As the several opinions in *Glucksberg* suggest, narrowly proscribing availability of physician assistance in dying is a rational if not compelling means for States to further their interest in preventing abuse of the procedure. *See*, *e.g.*, *id.*, 117 S.Ct., at 2291 (Souter, J.) ("The case for the slippery slope is fairly made out here * * * because there is a plausible case that the right claimed would not be readily containable").

hopeful" about her prognosis. That is not a "terminal" condition within the meaning of Measure 16, plain and simple.

The court of appeals' willingness to "assume" that Ms Elsner has a terminal disease and to focus on the speculative nature of the injury is understandable, because the opinion served to provide potential plaintiffs with far more guidance about what would be required, even for someone given a prognosis of less than six months to live.[7] The district court's willingness to look past that flaw in standing is perplexing, but it is consistent with the generous view the trial court took of plaintiffs' standing generally. *See* Pet. Cert. 57a–62a. In any event, were this Court to grant review, the fact that Ms Elsner has not been shown to have a terminal illness would be insurmountable and would preclude going any further in the case.

b. Future Injury

The court of appeals, while simultaneously noting its doubts about whether Ms Elsner is terminally ill, ultimately rejected her claim of future injury as built upon a "chain of speculative

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[7] Specifically, the court stated: "Although she has not been given a prognosis of less than six months to live, for purposes of analysis we will assume that she has a terminal disease within the meaning of Measure 16." *Lee v. State of Oregon*, Pet. Cert. 10a. Later, in analyzing physician standing, the court explained the reason for its assumption:

> We note that Elsner may not in fact have a "terminal disease" as defined in Measure 16, and may therefore not be able to invoke Measure 16's provisions in the first instance. However, precisely because of the possibility that the named doctors and residential care facilities could assert the interests of their terminally-ill patients, we assume that Elsner does have a "terminal disease" for purposes of the "injury in fact" analysis.

Id., Pet. Cert. 15a, n. 3. Thus, the court recognized that where the physician plaintiffs were concerned, other terminally ill patients undoubtedly were involved. The court reasonably focused on its concerns about the unduly speculative nature of Ms Elsner's injury so that the plaintiffs would understand that even patients who could demonstrate the necessary prognosis would have to be "closer to suffering the asserted injury than Elsner." *Id.*, Pet. Cert. 15a.

contingencies." Pet. Cert., at 11a. Plaintiffs dispute that conclusion, attempting to refute each link in the court's chain. For present purposes, rather than debate plaintiffs' argument point by point, the State is content to rely on the court of appeals' discussion, because it is persuasive. A few added points about the record and the court of appeals' conclusion can be profitably highlighted, however.

First, in their petition, plaintiffs never meet the court of appeals' concern that Ms Elsner's claim of future injury rested all but entirely on assertions drawn from "empirical facts" about terminally ill persons in general. Specifically, plaintiffs' argument essentially is that terminally ill adults generally tend to suffer from depression; that such depression generally tends to impair their decision-making; that treating physicians generally have difficulty diagnosing depression; and that when terminally ill individuals are treated for depression and pain, they generally change their minds about wanting to die. In short, Ms Elsner's claim of injury was built more on allegations about the class she sought to represent than on her own circumstances.

As the court below observed, however, Ms Elsner's claim of future injury must be *individualized* as to her. *Lee v. Oregon*, Pet. Cert. 12a. She *personally* must be able to claim that she will imminently suffer the injury alleged. That is no less true for a class action than for other suits. "That a suit may be a class action, * * * adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n. 20 (1976) quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Plaintiffs continue to rely on generalized evidence about termi-

nally ill persons, rather than Ms Elsner's individualized circumstances. *See generally* Pet. Cert. 13–16. To the extent they do, their claim of standing must fail.

As to the *individualized* demonstration of Ms Elsner's standing, the court of appeals was gentle-handed with what were completely inadequate proofs. No credible argument can be made on this record that Ms Elsner is imminently in danger of suicidal depression or undue influence that would cause her to obtain a lethal prescription under Measure 16. One simple fact defeats it: Ms Elsner's own testimony that she could not foresee herself seeking a physician-assisted death under any scenario. She could envision facts that hypothetically might cause a person to want to make that choice. But she candidly acknowledged that her philosophical opposition to doing so is so strong that it was not a decision she thought she would ever make.

That testimony, in and of itself, forecloses her claim of standing. But the record is defective in other ways, as well. Ms Elsner's family is fully aware of her opposition to suicide under any circumstance and supports her efforts to defeat Measure 16. Her treating physician has proven capable of recognizing her depression, even if other physicians might not. Moreover, her physician knows of her opposition to Measure 16. It is only reasonable to conclude that Ms Elsner's family and physician would be highly suspect of any request she would make for a lethal prescription and they would not readily comply with it without forcing some form of consultation with a mental health professional. Of course, that is not certain. But plaintiffs' claim requires the Court to try to anticipate future events. In so speculating, the far more likely scenario in Ms Elsner's individual case is that she would be surrounded by friends, family and physicians who all would recognize something was amiss if *she*, of all people, made such a request. Indeed, in her particular case

and on this record, such intervention seems nearly certain. And while one could wonder whether Ms Elsner might discharge her current doctor, or might find a way to guard family and friends from the knowledge that she was asking for a lethal prescription, such speculation goes far beyond anything this record suggests.

In short, Ms Elsner's factual showing of standing is not only weak, but it is affirmatively refuted by her own statements. The court of appeals, rather than seizing on that problem, addressed the aspects of her claim that are more typical of the class she sought to represent in general, perhaps so that plaintiffs would understand the hurdles they would face even with other potential class representatives.

The fact is, for someone not yet suicidal, not yet clinically depressed, not yet asking for a lethal prescription, and for whom the safeguards have not yet proven inadequate, it is difficult to show an "imminent" likelihood of the injury plaintiffs seek to redress. The problem is compounded by the fact that the claimed injury requires a series of cumulative failures—that is, a failure of physician judgment, *and* of witness judgment, *and* of waiting periods to result in a change of mind or mental state, *and* of notification to family, *and* of concerned family or friends to intervene, among others. As this Court has pointed out, standing is inherently difficult to show when the claimed injury is caused by government regulation or nonregulation of third parties:

> When * * * as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed [than when plaintiff is a direct object of government action or inaction]. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the

> response of others as well. The existence of one of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict" and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

Lujan v. Defenders of Wildlife, 504 U.S., at 561.

In effect, plaintiffs undertook to show here that imminent injury-in-fact will befall them because the State does not *sufficiently* regulate this personal choice and the professionals involved in it. The injury they complain of is not a direct consequence of decisions government makes or actions government takes. Instead, it follows from the personal choices of plaintiffs, the professional judgments of physicians, the observations of witnesses, the interest and attentiveness of family and friends, and myriad other factors. Plaintiffs' obligation, therefore, was to show that those choices, misjudgments, and errors have been made, or with high likelihood, imminently will be made. And as the court of appeals recognized, because the injury depends not just on a single choice and misjudgment, but on a full and unbroken sequence of them, the showing they must make becomes significantly more difficult. That is not a basis for objection, however. Instead, it is the heavy burden plaintiffs assumed in bringing this lawsuit on the theories they alleged. The specific factual evidence relevant to Ms Elsner's standing simply did not satisfy that burden.

c. Present Injury

The second prong of plaintiffs' argument in their petition is that Ms Elsner suffers a present injury. The argument is that the moment Measure 16 takes effect, she stands *presently* stripped of the civil and criminal protections available to the non-terminally ill, and she thus suffers a present injury-in-fact. Pet. Cert. 22. That argument fails as a matter of law and on the pleadings and proof.

First, as a matter of law, Measure 16's mere enactment does not work any immediate and present change of legal status or position for any terminally ill adult. Terminally ill adults are protected by civil commitment and criminal laws to the same extent as non-terminally ill adults unless and until they obtain a lethal prescription by following all of the special procedures that Measure 16 requires. That is, a terminally ill adult is in a position identical to that of a non-terminally ill adult *unless* the terminally ill person first makes the choice to have physician assistance in dying and then goes through the full series of steps required by Measure 16's terms.[8] No terminally ill person, upon

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[8] Measure 16 contains detailed requirements for obtaining physician assistance in dying. *See generally* Pet. Cert. 20a–34a. The Act does not require physicians to honor patient requests for assistance in dying. If a physician chooses to do so, however, upon a proper patient request, a physician can write the requested prescription and avoid civil and criminal liability if she acts in accordance with the safeguards set forth in section 3 of the Act. The safeguards include: (1) an initial determination by the attending physician that the patient has a terminal disease, is capable, and has made the request voluntarily; (2) disclosure by the attending physician to the patient of the medical diagnosis, prognosis, risks, probable result, and any feasible alternatives; (3) confirmation by a second physician of the diagnosis and the fact that the patient is capable and acting voluntarily; (4) counseling whenever the attending physician or consulting physician suspects that the patient may be suffering from a psychological disorder or depression causing impaired judgment; (5) family notification (at the option of the patient); (6) a requirement that the patient make at least two oral requests and one written request; (7) a fifteen-day waiting period between the initial request

(continued...)

Measure 16's enactment, stands presently "stripped" of anything. As a matter of law, until Ms Elsner invokes the choice that Measure 16 makes available to terminally ill persons and follows the procedures that Measure 16 requires, her legal position is unchanged.

Second, as a matter of pleading and proof, this injury is not alleged in the complaint or established in the record. The standing inquiry requires "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S., at 752. The gravamen of the complaint here is that Ms Elsner will suffer an imminent and substantial future injury in the form of an unwanted death, due to Measure 16's inadequate safeguards. No present injury is alleged. Nor did the more specific factual evidence produced through Ms Elsner's affidavit and deposition remotely suggest that she suffers this "present" injury; indeed, she explicitly denied that she does. *See*, *infra*, at p. 5.

2. Physician/Health Care Providers

Plaintiffs make several arguments as to why the Ninth Circuit was wrong in concluding that the physician and health care providers lack standing in this case. Those arguments are without merit.

1. As plaintiffs recognize, to the extent that the physician and other health care providers attempted to invoke the standing of their terminally ill patients who would be in the class represented by Ms Elsner, their standing at a minimum succeeds or fails with Ms Elsner's standing. Because Ms Elsner lacks standing, the

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[8](...continued)

and the writing of the prescription; and (8) a right to rescind the request at any time regardless of the patient's mental state.

physician and health care providers cannot assert standing to represent the interests of their patients in the class.

2. The court of appeals recognized that the physicians' and heath care providers' claims went beyond asserting the rights of their terminally ill patients. Rather, they included allegations that Measure 16 violates protected speech, religion, and association interests of the providers by requiring them to advise patients of their choices under Measure 16, to associate with physicians who are willing to provide prescriptions under the Act, and/or to transfer patient records to physicians who are so willing. *Lee v. Oregon*, Pet. Cert. 17a. The Ninth Circuit correctly concluded that those claims suffer from both ripeness and standing problems.

As the Ninth Circuit held: "Measure 16 does not provide for any penalty, criminal or otherwise, for a violation of the challenged provisions." *Id.*, Pet. Cert. 18a. Rather, the Act imposes criminal sanctions only for forging a request for a lethal prescription and for coercing a patient to make a request for life-ending medication. Measure 16, § 4.02; Pet. Cert. 31a. The Ninth Circuit held that without any penalty for failing to provide information to patients and refusing to transfer records or to facilitate patient choice in other ways, there was no concrete and particularized injury to the health care providers. *Ibid.*

Plaintiffs disagree with that conclusion only factually. They point to section 4.02(4), which provides that the criminal penalties set forth in the Act do not preclude criminal penalties applicable under other laws for conduct inconsistent with the provisions of the Act. The obvious point of that provision is to ensure that penalties for crimes such as murder and assault remain in force if a physician provides a lethal prescription to a patient without complying with the requisite procedures (terminal diagnosis, a properly witnessed request, waiting periods com-

plied with, second physician assessment, et cetera). Plaintiffs' claim might have merit if they could identify some provision in Oregon's criminal code imposing criminal penalties on a physician or health care provider for refusing to transfer a patient's records, refusing to advise the patient of available medical procedures, and so on. Plaintiffs have never alleged that there are any such statutes, nor do they cite any in their argument to this Court. Their claim is without merit.

3. Finally, plaintiffs fault the Ninth Circuit for concluding that any injury the health care providers suffer because of their obligation to advise patients about Measure 16 procedures arises from the informed consent law, not from Measure 16. *Lee v. Oregon*, Pet Cert. App. 17a, n. 6. Plaintiffs argue:

> The panel has ignored the fact that if Measure 16 did not exist there would be no problem, but because it exists these plaintiffs have an imminent, concrete, and particularized injury * * * The panel has confused a cause of action with the imminent injury which gives standing.

Pet. Cert. 29.

It is plaintiffs, not the Ninth Circuit, who are confused. Plaintiffs are not entitled to bring a cause of action directed at an injury related to some other cause of action. As the Court has repeatedly stated, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct under the challenged law or policy. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S., at 474–75. In this instance, by plaintiffs' own admission, their alleged injury is directly and fairly traceable to the requirements of the informed consent law, not Measure 16. To remedy that claimed injury, they must bring the appropriate cause of action.

III. Review Would Unnecessarily Delay Final Judgment in the Case.

This Court and the nation already have taken notice of the historically and politically significant enactment that is the object of this litigation.[9] Oregon's Death With Dignity Act is the first American law of its kind, one in which a State's democratic process has adopted a policy of regulating rather than prohibiting physician assistance in some end of life choices. In effect, even in advance of this Court's invitation to do so,[10] Oregon undertook a full public debate on this difficult and emerging issue and chose to provide a solution through the institutional competence of its legislative processes.[11] The solution has never been implemented, however. Oregon's law was enacted nearly three years ago. It has been enjoined by litigation since, without taking effect for so much as one day.

If the State could waive standing requirements and invite the Court to settle the merits, or at least to remand the case promptly to the Ninth Circuit for that purpose, it might do so here. Resolution of the constitutional and statutory challenges plaintiffs have raised would remove the cloud that this litigation has cast over Oregon's Death With Dignity Act. Moreover, if the law

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[9] *See Washington v. Glucksberg*, 117 S.Ct., 2262, n. 7 and 2266, n. 14 (majority); and 2292 (Souter, J. concurring).

[10] The majority and several of the separate concurring opinions in *Glucksberg* extend an express invitation to the States to use their democratic processes to debate the issue of physician assistance in dying for the terminally ill, to examine the evidence through the legislative process, and to devise not only appropriate policies as an outcome of that debate and examination, but to experiment with those policies so that the issue can be better explored both socially and judicially. *Id.*, 117 S.Ct., at 2275 (majority); 2302–03 (O'Connor, J., concurring); 2303 (Stevens, J., concurring); 2292–93 (Souter, J., concurring).

[11] This Court has recognized that the laws generated through the initiative process are subject to the same analysis under federal constitutional provisions as those of representative legislative process. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 809, n. 19 (1995).

survives plaintiffs' challenges, as the State believes it will, Oregonians may then have the benefit of the policy they enacted for themselves and their families, and the nation can have the benefit of Oregon's experience with that law.

These plaintiffs plainly have not carried their burden on standing, however. Resolution of the merits must await another lawsuit (assuming one is filed) brought by plaintiffs who can demonstrate an injury-in-fact sufficient to establish standing.[12] A grant of review in this case would serve no purpose, other than to delay finality in the case unnecessarily. The petition does not present the Court with a legal question of importance. Nor would the outcome of the case change, even if the Court were inclined to grant the petition to review the case for factual error. The Court would simply forestall an evitable outcome. The same is true of delaying action on the petition until after November, as plaintiffs have asked the Court to do.[13]

Plaintiffs' interests, to be sure, are preserved in the interim, for an injunction ensures that terminally ill adults will not have

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[12] While standing may be difficult to show, it is not hard to envision a proper plaintiff, assuming that plaintiffs are correct in their assertions about the inadequacies of Measure 16's procedures. It may be, as plaintiffs hypothesize, that a person who is suicidally depressed and seeking physician assistance in dying due to that depression will not be willing to sue to invalidate Measure 16. Pet. Cert. 11. But family members (*e.g.*, spouse, parent, son or daughter, brother or sister) in such near danger of losing a loved one likely would be able to make the necessary showing of imminent injury. Of course, some individuals may invoke Measure 16 without their family members' knowledge. But not all will, and not all physicians and other health care personnel would fail to alert family members to the terminally ill person's choice. If the number of terminally ill persons likely to act out of severe depression rather than pursuant to a competent and knowing choice is as great as plaintiffs speculate, there should be ample family member plaintiffs to bring that case.

[13] *See* Pet. Motion to Defer Consideration. Delaying a ruling on the petition until after the November 4, 1997, referral may provide plaintiffs and other opponents of Measure 16 with a political advantage in the form of on-going uncertainty about the constitutionality of the law. Plaintiffs properly do not rely on that as a basis to urge the Court to delay a ruling on the petition, however.

the legal ability to make a choice plaintiffs fear they will make for the wrong reasons. Just as surely, however, many Oregonians believe they are significantly prejudiced by delay in resolving this lawsuit. They view Measure 16 not as infringing on their interests, but as securing their personal autonomy and dignity. The injunction and the stay of the Ninth Circuit's judgment denies them the ability lawfully to make a choice that they believe they can make competently, on the basis of sound medical advice, and with the support of family and friends. Those individuals have been deprived of the benefit of the law throughout the course of this case.

For that reason, the Court should not delay a decision on the petition. Because the petition does not present an unsettled legal question of significance and the case is clearly decided correctly on its facts, the Court should deny the petition and bring finality to this case at the earliest opportunity.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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